No. 2837.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Union Hollywood Water Company, a corporation,
Plaintiff in Error,
vs.
John P. Carter, Collector of the United States Internal Revenue for the Sixth District of the State of California,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Southern District of California.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This action is brought against the defendant in his capacity as collector of internal revenue, to recover taxes alleged to have been illegally assessed to, and collected from, the plaintiff in error, same having been paid under protest. [Tr. p. 6.]

The defendant in error demurred to the complaint [Tr. p. 31] and his demurrer was sustained; thereupon, the plaintiff declining to amend, an order was entered, sustaining the demurrer and dismissing the cause [Tr. p. 33], and judgment was entered accordingly. [Tr. p. 34.]

To this judgment the writ of error is directed, the sole question being as to whether or not the complaint states facts sufficient to constitute a cause of action.

In the following argument the word "plaintiff" will be used to denote the plaintiff in error, and "defendant" refers to the defendant in error.

The Complaint is in Two Counts.

In the first count plaintiff seeks to recover of defendant, as collector of internal revenue, $718.83, collected by him of and from the plaintiff for the year ending December 31st, 1912, upon an alleged illegal assessment of income taxes for that year.

The second count is for the recovery of $591.51, collected by defendant of and from the plaintiff for the year ending December 31st, 1913, upon a similar assessment.

The principle involved in both counts is the same, and it is not necessary that they should be separately argued.

This Action is Maintainable Against Defendant as Internal Revenue Collector.

Apparently opposing counsel do not question this, as no argument on the point was made in the court below.

The demurrer being general however, we submit the following authorities upon the point.

The general provisions of the United States internal revenue laws do not explicitly authorize the maintenance of a suit for the recovery back of such taxes when illegally or improperly exacted, but they do so by clear and necessary implication, * * * and in

accordance with these general provisions, it is held that a United States District Court has jurisdiction of an action to recover money paid to the United States under an erroneous assessment as internal revenue tax and penalty. * * * Besides which, the Federal Judicial Code of 1911 (section 24) provides that district courts of the United States shall have original jurisdiction of all cases arising under any law providing for internal revenue. And under recent legislation of Congress, a suit to recover taxes alleged to have been wrongfully assessed and collected under the internal revenue laws, may be brought directly against the United States instead of against the collector, though the latter is more usually made the defendant.

Black on Income Taxes, sec. 130, and cases cited in note.

Payment Made Under Protest.

The complaint so alleges, and copies of the notices served upon the defendant at the time of making payment, are attached to the complaint. [Exhibits "B" and "D," Tr. pp. 22 and 26.]

It is a general principle of law applicable to income taxes, as well as to any others, that after a taxpayer has exhausted his lawful remedies to induce the administrative officers to cancel or reduce an assessment which he considers illegal or unjust in whole or in part, he must then pay the tax, but may save his right to bring an action for its recovery by accompanying his payment with a protest, addressed to the officer charged with the collection of the tax. This

rule was held applicable to the corporation excise tax law of 1909, and a ruling was made that, no particular form of protest having been prescribed, any form would be sufficient if filed before the payment of the tax, etc.

Black on Income Taxes, secs. 127, 128 and 129;
Abrast Realty Co. v. Maxwell, 206 Fed. 333.

No Appeal to Commissioner Required.

The complaint alleges that application was made to the commissioner of internal revenue for review of the assessment complained of and that he overruled the application and claim, and refused to abate the said tax or any part thereof, and directed the defendant to collect the same from plaintiff. [First count, paragraph VI, Tr. p. 11; second count, paragraph VI, Tr. p. 16.]

Where, after the assessment of an internal revenue tax, alleged to be illegal, application is made to the commissioner of internal revenue for review, and he overrules the application and refuses to abate the tax, it is held that this is a sufficient compliance with the statute, and the plaintiff is not bound after paying the tax, to appeal again to the commissioner as a condition precedent to his right to sue the collector for the recovery of the tax.

Black on Income Taxes, sec. 131;
Weaver v. Ewers, 195 Fed. 247.

It is further alleged in the complaint [paragraph VIII, Tr. p. 18] that any appeal from the assessment complained of to the commissioner of internal revenue would have been an idle and useless act; that having

overruled the plaintiff's application and claim for remission and abatement of the aforesaid tax, and having directed the collection thereof from plaintiff, the said commissioner would have affirmed his former ruling and dismissed such an appeal if the same had been taken.

This allegation is strictly in conformity with the language of the court in Weaver v. Ewers, above cited.

Statement of Facts.

Plaintiff is a public utility corporation engaged in the operation of a water system for furnishing and distributing water to the public; it devotes to the public use, as a public utility company, its property and plant, consisting of wells, pumps, mains, laterals, reservoirs, pipes, machinery, leased lands, leased water plant, real estate and other accessories necessary and essential to the operation of its system.

It will appear from the complaint that the assessments complained of are founded upon alleged income received by plaintiff during the years 1912 and 1913.

In the year 1912 plaintiff received from consumers to pay for service connections to be laid in public streets, the sum of $33,024.50, and expended in laying such service connections the sum of $31,006.12.

In the same year plaintiff received from property owners and persons engaged in the subdivision and sale of real estate, to pay for extensions of the plaintiff's system into their property, the sum of $52,895.65, and expended in laying extensions of its system in and through such property, the sum of $51,235.12.

For the sake of brevity these items will be henceforward referred to as "service connections" and "bonus pipes."

In the year 1913, plaintiff received from consumers to pay for such service connections the sum of $24,814.99 and expended in laying such service connections the sum of $28,558.26.

In the same year plaintiff received in payment for such bonus pipes the sum of $32,785.69, and expended in laying such bonus pipes the sum of $29,927.03.

In its income tax returns for 1912 and 1913, plaintiff included these receipts in its gross income and claimed a credit and deduction for the amounts so expended under the heading of "Expense of Installation Services and Bonus Pipe Extensions." [Tr. pp. 21 and 25.]

The credits so claimed were disallowed by the commissioner of internal revenue, the result being that plaintiff was charged as a part of its income for the years 1912 and 1913, with the gross amount received from the two sources referred to, viz.:

(1) Moneys received from consumers to pay for the installation of service connections.

(2) Moneys received from persons engaged in the subdivision and sale of real estate, to pay for the extension of plaintiff's system into property proposed to be subdivided and sold by them.

As a result of the commissioner's ruling, plaintiff was required to and paid (under protest as already stated) the following sums:

TAXES OF 1912.

On service connections	$276.08
On bonus pipes	442.75
Total	$718.83

TAXES OF 1913.

On service connections	$254.83
On bonus pipes	336.68
Total	$591.51

The assessment based upon service connections is segregated and stated separately from the assessment on bonus pipes so that, in the event that any distinction is sought to be drawn between the receipts from those sources, which the court may consider sound, its judgment may be rendered in accordance with such distinction. In our opinion no such distinction exists.

POINTS AND AUTHORITIES.

I.

It is admitted by the plaintiff that certain moneys were received from the sources mentioned, and for that reason such receipts were included in its statement of gross income; perhaps it was not strictly necessary to include these receipts in gross income, but it was considered the safer and better plan to do so and, in arriving at the plaintiff's net income, to claim a deduction for the expenditures made out of the moneys so received. The deduction so claimed was disallowed by the department and this action resulted.

Our first inquiry should be as to the distinction between the moneys so received and moneys which represent gains, profits, or "net income" within the meaning of the statute in force in 1912 and 1913, viz.: Corporation Excise Tax Law of 1909 (36 Stat. 112, U. S. Comp. Stat. Supp. 1909, p. 844.)

It is contended on behalf of the plaintiff as follows:

(1) That moneys collected from consumers to pay for service connections laid in public streets and expended for that purpose, as well as

(2) Moneys received from property owners and persons engaged in subdivision and sale of real estate, to pay for extensions of its system into their property (called "bonus pipes") and expended in the construction of such extensions:

are not gains, profits, or income within the meaning of said statute.

II.

Such moneys are contributed solely for the purposes designated and for the benefit of the contributors.

They are not subject to distribution among the stockholders of the plaintiff in the way of dividends, or otherwise, nor can the same be used to defray expenses or to pay taxes, interest, etc. These moneys are paid over to the plaintiff for a specific purpose and must be applied to that purpose, viz.:

To purchasing water pipe and service connections and laying the same in public streets for the benefit of the public; the effect is to increase the plant of the plaintiff, but not its gains, profits or income, ex-

cept so far as it enables the plaintiff to collect rates from such additional consumers as may be supplied with water by the service connections and extensions so laid.

It is thoroughly well recognized that a public utility company engaged in serving the public is not the *owner* of its plant and property devoted to the public use, in the sense of *personal ownership,* but is merely intrusted with the use thereof, which it must devote to the public.

Under the provisions of the California Constitution, the use of all water appropriated for sale, rental, or distribution, is a public use.

California Constitution, article XIV, section 1:

> "When a man parts with his property it is no longer his. When he devotes it to a public use, it ceases to be private property. He, in effect, grants to the public an interest in such use and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use."

Spring Valley Water Co. v. San Francisco, 165 Fed. 667-676;

Munn v. Illinois, 94 U. S. 113 (24 L. Ed. 77).

The latter case was referred to by the Supreme Court in a later decision, as follows:

> "The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is affected with a public interest, it ceases to be *juris privati* only,' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence and affect the community

at large,' and so using it, the owner 'grants to the public an interest in that use and must submit to be controlled by the public for the common goods.' * * * It is the business that is the fundamental thing; property is but its instrument, *the means of rendering the service* which has become of public interest." (Italics ours.)

German Alliance Ins. Co. v. Lewis, 233 U. S. 389-409 (58 L. Ed. 1020).

See also:

Budd v. New York, 143 U. S. 517 (36 L. Ed. 247);

Brass v. North Dakota, 153 U. S. 391 (38 L. Ed. 757).

The language quoted above, and the case of *Munn v. Illinois* (*supra*) are referred to with approval by the California Supreme Court in

Contra Costa Water Co. v. Oakland, 159 Cal. 323, 333.

And in the same opinion (p. 334) the court states the rule, which is now firmly established by the decisions of the United States Supreme Court, viz.:

"It is now well settled that what one engaged in furnishing water to the public is entitled to demand is 'a fair return upon the reasonable value of the property at the time it is being used for the public' over and above its necessary operating expenses, including current repairs and taxes."

An appropriator of water for public use is but an instrumentality for the distribution of the water to such members of the public as might apply for them

and pay to him the legal charge for the service he had rendered.

Leavitt v. Lassen Irri. Co., 157 Cal. 85.

"It is true, as said in the Leavitt case, that the person in charge of the public use is a trustee in charge of a public trust, 'the agent in the execution of this public trust' and that he cannot lawfully burden this trust or the property devoted to and held for the purposes of the trust. And so he cannot convey it away absolutely to private use, or contract for a preference to one consumer to the detriment of others, etc."

Southern Pac. Company v. Spring Valley Water Co., 159 Pac. .... (52 Cal. Dec. 273).

The Principle is Not Affected by the Method of Acquisition.

If acquired by purchase, inheritance or gift, a water system, when devoted to public use, "ceases to be *juris privati;*" it is thenceforth charged with the burden of supplying the public, and at *rates which are fixed by the public.*

There is no distinction between the acquisition of a pipe system and the acquisition of money which must be devoted to the installation of such a system.

The contributions in question here represent money *received* by the plaintiff, it is true, but the plaintiff is legally bound to devote said moneys to the acquisition of property in the form of service connections and water pipe, which property is impressed with a public burden, viz., that of supplying water to the public and to that purpose it must be perpetually devoted; its

only value then to the plaintiff is to enable the latter to earn an income by collecting rates from water consumers in the territory wherein the extensions and service connections are laid; otherwise, the plaintiff would be charged with the burdens of a trustee for the public benefit, entirely without any compensation in the way of revenue.

The situation may be further illustrated by assuming that the public owned a system of pipes already laid, and bestowed the same upon the plaintiff, but required the latter to obligate itself to use the same and supply water therewith unto the donors perpetually, its sole compensation being the rates to be collected for water furnished; such a donation, but for the water rates, which we concede to be revenue or income, would constitute a *burden* rather than a *gain* to the plaintiff; the plaintiff's income from rates is the sole advantage it can gain from such a donation; its interest in such a system, although called ownership, is merely usufructuary.

If A should donate to B a well, upon the condition that B should pump water therefrom for A's use and benefit and for no other purpose, it is manifest that B would not be benefited except by such wage as A agreed to pay him for his labor.

This argument is further emphasized when it is remembered that the donor (the public) asserts the right to establish the rates which the plaintiff is entitled to collect for performing the service.

Without such rates the plaintiff would be under a public burden and would receive *no revenue,* which is the best illustration of our contention that these con-

tributions are not gains or profits; the plaintiff has no income other than the moneys received by it for water supplied to consumers; out of this income all of its expenses must be paid and the residue, if any, is subject to distribution among its stockholders in the way of dividends; but no portion of its plant or system required for the performance of its public duties, least of all the service connections and pipe extensions for which these contributions are received, can be diverted to any other purpose or converted into money or other property; the pipes must remain where laid and must be kept in repair and supplied with water in order that the public may be served.

We submit that property so acquired and thus burdened should not be classified among gains, profits or income received by the plaintiff. Yet, the assessment complained of was based upon the conclusion of the commissioner that the mere receipt by the plaintiff of such moneys from the sources mentioned, constituted taxable income and that plaintiff was not entitled to any credit or deduction on account of the expenditure of said moneys in the creation of property in which the plaintiff's interest is no more than that of a public servant.

Regarding these Contributions as Gifts Outright, they are Not Taxable Income.

Gifts have not been regarded as income within the meaning of income tax statutes and, under the present statute as we shall point out, are expressly excluded.

> "The federal income tax law includes 'the income from, but not the value of, property acquired by gift, bequest, devise or descent.' But

aside from this specific exception and as the problem might arise under other taxing laws, the question whether an acquisition of the kind supposed would be taxable as income must depend upon the construction of the statutes. They contain terms broad enough to cover all such cases, as, where the act of Congress in force declares that the tax shall be laid on 'the entire net income received from all sources,' and upon 'gains or profits and income derived from any source whatever,' and the Wisconsin statute, after enumerating certain items, taxes 'all other income of any kind derived from any source whatever.' If these expressions are to be construed as effective to the full extent of the language employed, they would undoubtedly include gifts, winnings, and pecuniary awards or prizes. But if, following the rule of statutory construction, the generality of these expressions is to be restricted by a comparison with the more specific terms used in the context, then they would include only gains or income from sources similar to, or comparable with those already enumerated, such as salaries, professional earnings, mercantile business, invested capital, and so on. Following the analogy of the English cases cited, it seems that such acquisitions as those we have instanced would not be regarded as income."

Black on Income Taxes, sec. 38, pp. 88-89.

The same author calls attention to the fact that the present statute (of 1913) contains the following express provision, viz., that the net income of a taxable person shall include

"gains or profits and income derived from *any source* whatever, including *the income from, but*

not the value of, property acquired by *gift,* bequest, devise or descent." (Italics ours.)

Black on Income Taxes, p. 267.

The language above quoted, which includes the income from, but not the value of, property thus acquired, is significant, and in our opinion has a direct application to the question we are considering. The rates collected by the plaintiff from consumers of water on the portion of its system purchased and paid for with the contributions aforesaid, are undoubtedly a part of its income and the same are included in its statement of revenue for the year 1912 and 1913, on which it has paid the income tax required by the statute.

The Act of 1909, it is true, did not contain language specifically exempting gifts but, as stated by Mr. Black in the foregoing quotation, other income tax statutes containing no such specific words of exemption, have been construed in England and in the United States as not including gifts in the definition of gains, profits, income, or "income derived from any source whatever"; yet those words are surely as comprehensive, if not more so, than those used in the Act of 1909, which imposes the tax upon *"the entire net income* over and above five thousand dollars received * * * *from all sources,"* etc.

We submit that the words "net income" would not include the contributions involved in this action, even if considered as gifts.

III.

CONSIDERED FROM THE RATE-FIXING STANDPOINT.

The status of such contributions has been the subject of much controversy before rate-fixing bodies in determining whether or not such contributions should be included in the water company's income as gains or profits, thus enabling the rate-fixing body to establish lower rates than would be otherwise possible.

The same controversy has been carried into the courts on appeal from the decisions of the rate-fixing bodies, the water companies contending that such contributions are not income and that the rates fixed should be high enough to permit a reasonable return on the value of their plants, exclusive of such contributions. They argue that such contributions cannot be distributed among stockholders or used to defray current expenses or in any way treated as revenue; that money so received is in no respect different from contributions in the form of pipes already laid and voluntarily turned over by the owners thereof upon the condition that the water company shall accept the same and supply water to consumers who can be supplied therefrom; the effect of such contributions whether in money or in pipes already laid, is to increase the plant, system and property of the water company, but not its income or revenue, except so far as it is enabled to collect rates from such consumers.

Therefore, all property so acquired should be added to the water company's investment and included in

the value of the property upon which it is entitled to earn a fair and reasonable income, but nothing more.

If such contributions are to be regarded as income and the water company's rates fixed accordingly, the following absurd situation might result, viz.:

Whenever, in a given year, the value of the property so acquired equals the water company's expenses and an amount sufficient to pay a reasonable dividend on the value of its plant, *no water rates* should be allowed for that year, because the water company's income is already sufficient by reason of the so-called donations, and it must supply its consumers for nothing!

The situation we have assumed is not beyond the bounds of possibility and there have been years in the plaintiff's history (previous to the passage of the excise tax statute) when such contributions in the form of pipes, or money, have reached a sum nearly equal to its required revenue for the year.

If regarded as income and the plaintiff's rates fixed accordingly, *no rates* would be allowed and the plaintiff would be required to supply water gratuitously, because the contributions from the sources mentioned were more than enough to pay the plaintiff's expenses and a reasonable return on its capital. Accordingly, the plaintiff would be required to obtain elsewhere the money necessary to pay its operating expenses, taxes, interest, etc., and go without any profits on its entire investment by reason of its having accepted such contributions!

Considered as Additions to the Plant.

Confronted by these absurdities, some of the advocates of lower rates have taken the position that such contributions are not to be regarded as *income,* but that the same should not be included in the value of the water company's plant upon which it is entitled to earn a fair return, the argument being that as the water company did not pay for the increase of its system, it should not be allowed interest thereon.

The latter doctrine has not up to this writing been countenanced so far as it is sought to be applied to bonus pipes, although there is a leaning in that direction on the part of the Wisconsin Railroad Commission. As applied to service connections, thus acquired, the railroad commission of California has rendered a decision holding that meters and services paid for by consumers are not proper elements to be allowed for rate-making purposes, and should be excluded from plant value in fixing rates.

City of Eagle Rock v. Eagle Rock Water Co., vol. 3, C. R. C. 1054.

This decision has since been referred to with approval by the California Railroad Commission in an opinion rendered in the Matter of the Application of the San Gabriel Valley Water Company to fix and increase rates, etc. Vol. 8 C. R. C. 481.

In the latter case Commissioner Devlin drew a distinction between meters and services paid for by consumers and the so-called bonus pipes paid for by real estate companies and others engaged in the exploitation and sale of property (as in the present case).

It was contended that all donated pipe should be excluded as an element of value for the purpose of this proceeding, the same amounting in value to $64,459. The conclusion of the commissioner was that the services and meters paid for by consumers should be excluded from plant valuation and, as to the so-called bonus pipes the language of the decision is as follows:

> "Although these pipes were expressly donated to the company, they are now the property of the water company and, as such the company is entitled to a return on their fair value. On the other hand, the use value is not measured by an estimate of cost, for there are a number of these pipe lines that have only one consumer for a large investment, and it is obviously unfair to permit it to become a burden upon the remainder of the system."

Pursuant to the above reasoning, the value of the bonus pipes was not fixed with reference to the *cost* thereof, but with reference to their earning capacity in the way of rates.

Applying this Reasoning to the Case at Bar.

If the water company is not allowed to include in its plant valuation the services paid for by consumers, it is obvious that such services, or the moneys contributed therefor, cannot be regarded as *income, gains or profits;* in fact, from the opinion of Commissioner Devlin, to which we have referred, it is apparent that the state railroad commission regards such services as the *property of the consumer,* as will appear from the following language:

> "From the evidence it appears that the intention of the parties interested was that the sum paid by the consumer was for the service connection, that is, the consumer purchased the service connection, but because he has no franchise, he cannot maintain property of this nature in the streets. That the consumer cannot so use his property is no reason why the title automatically passes to the water company and later adds to the burden on that same consumer, in an appraisal for rate-making purposes."

If the services paid for by the consumers *belong to the consumers,* it is obvious that the water company merely expended the money contributed by the owner in installing the service connection and acquired no title therein or to the money thus expended—except, as we have already said, the right of an usufruct. Again we submit that money or property having such a status cannot be regarded as income, gains or profits and should not be subjected to the payment of income taxes.

The same principle applies to the bonus pipes, although it appears that the railroad commission considers them as properly included in plant valuation for rate-fixing purposes.

It will be observed that they are not so included upon the basis of *cost,* but merely in proportion to their earning capacity, that is to say, according to the number of consumers who are supplied by such pipes. This clearly indicates that the rates, *and the rates alone,* are the basis of the water company's income and the bonus pipes cannot be considered in determin-

ing the amount of its income. In the case at bar the amount received by the plaintiff in the year 1912, in the way of contributions for bonus pipes was $52,895.65, and in 1913 the plaintiff received from the same source $32,785.69; under the internal revenue commissioner's ruling, both these sums are included in the plaintiff's income and no deduction is allowed by reason of the water company's having expended, of the moneys so received (and in the construction of so-called bonus pipes) the sum of $51,235.12 in 1912, and the sum of $20,927.03 in 1913. Thus, the plaintiff is charged with having received an income equal to the actual *cost* of the bonus pipes when the valuation placed thereon for rate-fixing purposes might not equal one-tenth of the cost, depending upon the sparsely settled condition of the territory into which such bonus pipes were laid.

It seems manifest that the plaintiff should not be charged with such property (if at all) at any amount exceeding its value for rate-fixing purposes, which amount does not appear and cannot be made to appear in its income tax return since it is necessarily an estimated value based upon the earning capacity of such pipe and depending upon the number of consumers, quantity of water supplied, etc.

In Wisconsin the railroad commission has ruled that neither service connections nor bonus pipes (referred to as "private mains") should be included in plant valuation for rate-fixing purposes.

We quote from its opinion as follows:

> "It appears to be clearly established that the charge assessed against the consumers by the company, for the installation of services, has been in the aggregate sufficient to cover the cost of this work to the company. In view of these facts we are of the opinion that the value represented in the services under consideration, and for which the consumers have paid, is not a fair element in the valuation for the purposes of this case. This applies also to the value of the so-called private mains, to the amount which the consumers have paid, and have not been reimbursed by the company."
>
> City of Beloit v. Beloit Water, Gas and Electric Co., 7 W. R. C. R. 187, decided July 19th, 1911.

Other rulings which include services and bonus pipes in plant valuation for rate-fixing purposes, are equally oppressive to the water company, by reducing its required revenue to the extent of the contributions so received.

The plaintiff in this action, seeking to restrain rates fixed by the Los Angeles city council as being confiscatory, has in two separate cases failed to obtain the injunction sought, because of rulings by the Superior Court, holding that the water company's required income for the ensuing year should be *diminished* to the extent of its receipts for the preceding year from such contributions, or at least, by such an amount thereof as would equal the deficit between its actual receipts from rates and the required income.

This is in effect a holding that the water company *must pay* for the service connections and bonus pipes and will be compelled to do so by the action of the rate-fixing body in diminishing its required income to the extent of the property so acquired.

The following conclusions must result:

(a) If the water company is not entitled to include such contributions in its plant value for rate-fixing purposes, they cannot be regarded as income in any sense of the word, for they produce no rates and are an added responsibility without any compensation.

(b) If the water company is obliged to *pay for* the service connections and bonus pipes by having the cost thereof deducted from its required revenue, the same cannot be regarded as income any more than other property *purchased* by the water company and added to its plant.

Whichever theory is adopted, the result is that property thus acquired cannot be regarded as gain, profit or income.

It is manifestly unjust and improper to force upon the water company the additional burden of paying an income tax upon such property.

Reverting to Our Opening Argument. (See Paragraphs I and II of this Brief.)

We do not concede that such contributions can be considered a part of the plaintiff's taxable income within the meaning of the income tax statute, even though they, or the pipes paid for therewith, may be allow-

able (on some basis of valuation) as a part of the plaintiff's plant for rate-fixing purposes.

We rely with confidence upon our first position that contributions to the plant of a public utility company, even considered as donations, are not taxable income; that the same are neither more nor less than semi-public property with which the plaintiff is entrusted by the donors (the public) to be operated for their use and benefit, for which services they agree to pay the plaintiff in rates—which rates they reserve the right to fix.

We request a reversal of the judgment.

Respectfully submitted,

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